Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1798

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH ANTHONY FAUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
STEPHEN J. MCHALE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Circuit and the United States Claims Court correctly concluded, in light of *United States* v. *Fausto*, 484 U.S. 439 (1988), that they lacked jurisdiction to review petitioner's renewed challenge to the adverse personnel action at issue in that prior case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Ainsworth v. *United States*, 399 F.2d 176 (Ct. Cl. 1968)	4
Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	7
Boese v. *Department of the Air Force*, 784 F.2d 388 (Fed. Cir. 1986)	7
Kerr v. *National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984)	7
Sampson v. *Murray*, 415 U.S. 61 (1974)	7
United States v. *Fausto*, 484 U.S. 439 (1988)	2, 3, 6

Statutes:

Back Pay Act, 5 U.S.C. 5596	4
31 U.S.C. 1349(b)	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1798

JOSEPH ANTHONY FAUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) and the order of the United States Claims Court (Pet. App. 5a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on January 19, 1990. On April 10, 1990, the Chief Justice granted an extension to May 19, 1990, in which to file a petition for a writ of certiorari, and the petition was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Joseph Anthony Fausto is a former employee of the United States Fish and Wildlife Service (FWS), an agency of the United States Department of the Interior. He began work for the FWS on January 8, 1978, as an administrative officer at the Back Bay Young Adult Conservation Corps camp, located in Virginia Beach, Virginia. Petitioner's appointment was to a position in the excepted service and was for a term ending September 30, 1982, or the date the Back Bay camp closed, whichever came first. *United States* v. *Fausto*, 484 U.S. 439, 441 (1988).

On January 16, 1981, the FWS removed petitioner from his position for cause, including the misuse of a government vehicle, but failed to advise him that he could file a grievance. The FWS permanently closed the facility at which petitioner had been employed on September 18, 1981. When he subsequently was advised that he could file a grievance to contest his removal, petitioner did so. The FWS decided that it had acted improperly in removing petitioner from his position and that he should have received only a 30-day suspension. Accordingly, the FWS rescinded petitioner's removal, imposed in its place a 30-day suspension, and paid him back pay from February 15, 1981 (the date the 30-day suspension would have ended), to September 18, 1981 (the date the Back Bay camp was closed). 484 U.S. at 441-442.

2. In 1983, petitioner filed a complaint in the United States Claims Court seeking back pay for the period covered by the 30-day suspension and for the period from the date the camp closed through the date of a judgment in his favor. The Claims Court dismissed the complaint. 7 Cl. Ct. 459 (1985). The court concluded that the remedial scheme for chal-

lenging adverse actions taken against federal employees established by the Civil Service Reform Act (CSRA) provides the sole avenue for pursuing such challenges. Because the CSRA makes no provision for judicial review of adverse actions taken against non-veterans in the excepted service, a category into which petitioner falls, the Claims Court held that it had no jurisdiction to entertain his claims. 7 Cl. Ct. at 460-461.

The Claims Court ruled alternatively that petitioner would not be entitled to the relief he sought. The court held that because petitioner had occupied a position in the excepted service and had served pursuant to a term appointment, his right to back pay ended with the abolition of his position by the FWS on September 18, 1981. Additionally, the court found that the 30-day suspension was justified because petitioner did not dispute that he had misused a government vehicle and a 30-day suspension was the minimum penalty mandated by statute for that offense. See 31 U.S.C. 1349(b) (1982). Consequently, the court determined that even if it had jurisdiction to entertain his claims, petitioner would not be entitled to any back pay in addition to that which he already had been paid by the agency. 7 Cl. Ct. at 461.

The Federal Circuit reversed and remanded, holding that, notwithstanding the enactment of the CSRA, petitioner could seek review of his claim in the Claims Court. The court of appeals further held that the agency's suspension of petitioner was invalid and, therefore, that he was entitled to back pay for the period of the suspension. 783 F.2d 1020, 1023 (1986).

This Court reversed. Addressing only the jurisdictional question, the Court agreed with the Claims

Court that the enactment of the CSRA precluded judicial review of petitioner's claim. 484 U.S. at 455. The Court noted that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action." *Id.* at 444. After examining the pre-CSRA scheme for administrative and judicial review, the Court explained that Congress had "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445.

The Court then examined the various avenues of review provided under the CSRA and found that none of them was available to petitioner. Rather, the Court found that Congress had made an informed decision that judicial review of adverse personnel actions should not be available to non-preference eligible, excepted service employees such as petitioner. 484 U.S. at 443-451. The Court considered petitioner's contention that the Back Pay Act (5 U.S.C. 5596) provides a basis for Claims Court jurisdiction because that Act authorizes the award of back pay to an employee "found by appropriate authority * * * to have been affected by an unjustified or unwarranted personnel action." While acknowledging that in the past other courts had found jurisdiction under the Back Pay Act for suits such as petitioner's (see, *e.g.*, *Ainsworth* v. *United States*, 399 F.2d 176, 181 (Ct. Cl. 1968)), the Court held that "under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." 484 U.S. at 454. Accordingly, the

Court held that the CSRA "prevents [petitioner] from seeking review in the Claims Court under the Back Pay Act." *Id.* at 455.

Petitioner sought rehearing, which was denied. 485 U.S. 972 (1988).

3. Despite this Court's determination that the Claims Court lacks jurisdiction to adjudicate his claim, petitioner filed a new complaint in the Claims Court in 1989 in which he made the same allegations that he had made previously. Thus, as the Claims Court found, he "again seeks to litigate his claim for pay for the 30-day suspension period and the period subsequent to his removal." Pet. App. 6a. The court noted that petitioner's "position approaches, if not reaches, the frivolous category." *Id.* at 7a n.1. It found that the decision of this Court was dispositive on the question of its jurisdiction to review the personnel actions disputed by petitioner and dismissed the complaint. *Id.* at 6a-7a.

The court of appeals affirmed. Pet. App. 1a-3a. The court noted that at the same time that the FWS cancelled petitioner's removal, the agency suspended him for a 30-day period and changed the effective date of his termination to the date the camp was closed. These three actions could not be viewed separately, the court held, and they were not reviewable by the Claims Court under this Court's prior decision. *Id.* at 3a. The court of appeals added that "contrary to Fausto's allegation, no appropriate authority has determined that either the 30 day suspension or the September 18, 1981 termination was improper." *Ibid.*

While the court of appeals "found Fausto's claim to be meritless and [felt] that it borders on the frivolous," the court declined the government's suggestion that it impose sanctions. Pet. App. 3a.

ARGUMENT

The unpublished decision of the court of appeals is not merely correct, but is mandated by this Court's prior decision in petitioner's case. Accordingly, further review is unwarranted.

Petitioner grounds his new complaint upon the language in this Court's opinion recognizing that "[n]ow, as previously, if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action[,] a suit for backpay will lie." 484 U.S. at 454. According to petitioner, the FWS made such a determination when it cancelled his removal. But petitioner refuses to acknowledge that at the same time that it cancelled the removal, the agency imposed a 30-day suspension, substituted a new removal date of September 18, 1981, and awarded appropriate relief in the form of back pay for the period from the end of the 30-day suspension until the date the camp closed. Thus, petitioner has received back pay for the period for which an "appropriate authority" determined that he "had undergone an unwarranted personnel action." Pet. App. 2a. What petitioner now seeks is back pay for the period of the 30-day suspension and the period following the closing of the camp. However, as the court of appeals correctly held (*id.* at 3a), no "appropriate authority" has determined that the personnel action suspending him for 30 days and removing him effective September 18, 1981, was "unwarranted."

Moreover, it is clear that petitioner has received all the relief to which he is entitled. It is well-established that in correcting a personnel action, an agency must only place an employee in the *status*

quo ante. *Sampson* v. *Murray*, 415 U.S. 61, 75 (1974); *Boese* v. *Department of the Air Force*, 784 F.2d 386, 390 (Fed. Cir. 1986); *Kerr* v. *National Endowment for the Arts*, 726 F.2d 730, 738 (Fed. Cir. 1984). This rule is consistent with the general rule that an injured party must be placed as nearly as possible in the position he would have occupied had the wrong not been committed. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975). In this case, when the agency cancelled petitioner's removal it placed him in precisely the position that he would have occupied had he not been removed; it suspended him for 30 days for his admitted misuse of a government vehicle as mandated by 31 U.S.C. 1349(b) (1982) and it terminated him effective September 18, 1981, the day the camp closed, because that was when his temporary appointment expired by its own terms. 7 Cl. Ct. at 460. Accordingly, as the Claims Court determined in the alternative when petitioner first commenced this action, there simply is no merit to his complaint. *Id.* at 461.

Finally, petitioner's action is barred by this Court's prior decision under *res judicata* principles. The Court held in that case that the Claims Court lacked jurisdiction to consider the claim that he has renewed by filing a new complaint in the Claims Court. The argument in his petition is merely a restatement of the argument in the rehearing petition that he filed seeking reconsideration of this Court's decision. As the Claims Court stated, petitioner "is clearly barred from relitigating the jurisdictional matters resolved by the Supreme Court." Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
STEPHEN J. MCHALE
Attorneys

JULY 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20021